

TENNESSEE REGULATORY AUTHORITY

Sara Kyle, Chairman
Deborah Taylor Tate, Director
Pat Miller, Director
Ron Jones, Director



460 James Robertson Parkway
Nashville, Tennessee 37243-0505

February 27, 2003

Jeffrey Rice
Memphis Networkx, LLC
7620 Appling Center Drive Suite 101
Memphis, Tennessee 38133-5069

RE: Memphis Networkx, LLC (Docket # 03-00071)

Dear Mr. Rice:

Memphis Networkx, LLC ("Memphis Networkx") was granted a Certificate of Convenience and Necessity, in Docket No. 99-00909, to provide intrastate and intraLATA local exchange telecommunications services in Tennessee on June 12, 2001 at a regularly scheduled Authority conference. Additionally, the Authority ordered Memphis, Light, Gas and Water Division ("MLGW") and Memphis Networkx, LLC to submit to an audit in order to determine whether Memphis, Light, Gas and Water Division and Memphis Networkx are in compliance with the Tennessee Code Annotated § 7-52-701 thru § 7-52-407 and the Authority's Order in Docket # 99-00909.

The Order in Docket # 99-00909 (copy attached) stated that the audit will be conducted by an independent auditor to be chosen by Memphis Networkx, LLC; however, the auditor will work under the direction and supervision of the TRA. The audits were ordered to commence one year from the date of the Order and continue on an annual basis. This Order was modified at a regularly scheduled Authority Conference held on January 8, 2002 to grant the annual audit period such that the initial audit period shall proceed from August 9, 2001 through December 31, 2002. The modification also stated that annual audits shall coincide with Petitioners' fiscal years.

Additionally "Memphis, Light, Gas & Water Division and Memphis Networkx, LLC are required to file an annual report which shall set forth:

1. the functions performed by Memphis Light, Gas & Water Division's Telecommunications Division;
2. the amount and types of costs allocated to the Telecommunications Division from Memphis Light, Gas & Water Division;
3. a description of the methods and procedures used to identify and allocate such costs;
4. the tariffed services provided by each of Memphis Light, Gas & Water Division's other divisions to Memphis Networkx, LLC;
5. the dollar amount of such transactions in item (4) above;

6. the non-tariffed services provided to Memphis Networkx, LLC by Memphis Light, Gas & Water Division;
7. the dollar amount of such transactions in item (6) above;
8. the method used to determine the price of such services (i.e. cost, prevailing market price, etc.);
9. the services provided to Memphis Light, Gas & Water Division by Memphis Networkx, LLC;
10. the dollar amount of each such service provided to Memphis Light, Gas & Water Division by Memphis Networkx, LLC; and
11. the method used to determine the price of such services (i.e. cost, prevailing market price, etc.)”¹

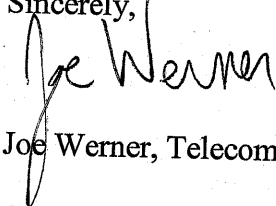
Further, Memphis Light, Gas & Water Division and Memphis Networkx, LLC shall maintain records in a manner that shall allow for audit and review by the Authority and shall comply with:

- (1) National Association of Regulatory Utility Commissioner’s “Cost Allocation and Affiliate Transactions Guidelines for the Energy Industry”;
- (2) Federal Communication Commission affiliate transaction rules, 47 C.F.R. § 32.27; and
- (3) Federal Communication Commission cost allocation rules, 47 C.F.R. § 64.901-.904.

As of the date of this letter, no correspondence has been received from Memphis Networkx regarding the requirement set forth by this Authority in Docket # 99-00909. Please provide both the name of the independent auditor selected by Memphis Networkx, LLC and the information necessary to allow the TRA to contact them to proceed with the Audit. Additionally, please provide the annual reports of Memphis, Light, Gas and Water and Memphis Networkx, LLC, pursuant to the attached, by March 1, 2003.

If you have any questions concerning this request or need additional information, please call Patsy Fulton at 615-741-2904 ext. 193.

Sincerely,



Joe Werner, Telecommunications Chief

Cc: Docket File, Chairman Sara Kyle, Director Deborah Taylor Tate, Director Pat Miller, Director Ron Jones, Richard Collier

Attachment

¹ Final Order Approving Amended and Restated Operating Agreement and Granting Certificate of Public Convenience and Necessity. Docket # 99-00909 p.40

BEFORE THE TENNESSEE REGULATORY AUTHORITY AT

NASHVILLE, TENNESSEE

August 9, 2001

IN RE:

**APPLICATION OF MEMPHIS NETWORK, L.L.C.
FOR A CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY TO PROVIDE INTRASTATE
TELECOMMUNICATION SERVICES AND JOINT
PETITION OF MEMPHIS LIGHT GAS & WATER
DIVISION, A DIVISION OF THE CITY OF MEMPHIS,
TENNESSEE ("MLGW") AND A&L NETWORKS-
TENNESSEE, L.L.C. ("A&L") FOR APPROVAL OF
AGREEMENT BETWEEN MLGW AND A&L REGARDING
JOINT OWNERSHIP OF MEMPHIS NETWORK, L.L.C.**

**DOCKET NO.
99-00909**

**FINAL ORDER APPROVING AMENDED AND RESTATED
OPERATING AGREEMENT AND GRANTING CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY**

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I. INTRODUCTION

This matter came before the Tennessee Regulatory Authority ("TRA" or "Authority") at a regularly scheduled Authority Conference held on June 12, 2001, upon the *Application and Joint Petition*, as amended on December 21, 2000, filed by Memphis Light Gas & Water Division, a Division of the City of Memphis, Tennessee ("MLGW"), Memphis Broadband, LLC ("Broadband"), and Memphis Networkx, LLC ("Networkx"). The Joint Petition, as amended, requests approval of the Amended and Restated Operating Agreement entered into by MLGW and Broadband for the purpose of creating Networkx, and the Application, as amended, seeks a Certificate of Public Convenience and Necessity ("CCN") on behalf of Networkx so that Networkx may provide intrastate telecommunications services.

II. FACTUAL HISTORY

On April 15, 1998, Larry Thompson, Senior Vice President and Chief Operating Officer of MLGW; Alex Lowe, Manager of A&L Networks-Tennessee, LLC ("A&L"); and Joe Warnement, Director at Arthur D. Little, Inc. ("ADL") attended a meeting to discuss the concept of MLGW entering the telecommunications market.¹ Shortly thereafter, A&L began investigating telecommunication plans and hired ADL as a consultant on the telecommunications market.² In July 1998, ADL conducted interviews of MLGW employees and examined MLGW records and documents for the purpose of creating a proposal, at no cost to MLGW, which would provide an assessment of the value of a municipal utility entering the telecommunications market.³

On July 20 through 21, 1998, MLGW held an Executive Planning Conference during which the participants discussed whether to issue a request for proposal for a

¹ Transcript of Proceedings, Sept. 15, 2000, v. IX-A, p. 51 (Hearing - Cross-Examination of Larry Thompson).

² *Id.*

³ *Id.* v. IX-B, pp. 67-69 (Hearing - Cross-Examination of Larry Thompson).

telecommunications venture.⁴ At this same time, ADL issued its Initial Report, which presented a comprehensive overview of MLGW's telecommunications services opportunities.⁵ On September 18, 1998, MLGW issued a request for proposal to one hundred and four (104) companies in search of a strategic telecommunications partner.⁶

On September 17, 1998, A&L and ADL entered into a written contract under which A&L agreed to pay ADL a set fee for specific services related to the presentation of a proposal to MLGW.⁷

On October 14, 1998, MLGW held a mandatory pre-bid meeting which was attended by twenty-five (25) company representatives.⁸ MLGW received responses to the request for proposals on December 1, 1998 from BellSouth Business Systems, A&L, East 46th Street Partners, Hicks & Ragland Engineering, MFS Network, Motorola, and Utilicom Networks.⁹ A&L's proposal included a reference to four-hundred thousand dollars (\$400,000.00) already expended by A&L in relation to the project.¹⁰ In December 1998, MLGW asked BellSouth Business Systems, A&L, East 46th Street Partners, and MFS Network Technologies to present their proposals.

On December 28, 1998, A&L contracted with ADL for a set fee to complete further work on the telecommunications venture.¹¹ On January 6, 1999, A&L made its presentation to

⁴ Hearing Exhibits 92 and 111.

⁵ Hearing Exhibit 65 (filed under seal).

⁶ Transcript of Proceedings, Sept. 15, 2000, v. IX-D, pp. 175-177 (Hearing - Cross-Examination of Larry Thompson).

⁷ *Id.* July 20, 2000, v. IV-B, p. 148 (Hearing - Cross-Examination of Alex Lowe) (filed under seal); Hearing Exhibit 66 (filed under seal).

⁸ Hearing Exhibit 83.

⁹ Transcript of Proceedings, Sept. 15, 2000, v. IX-D, pp. 175-177 (Hearing - Cross-Examination of Larry Thompson).

¹⁰ Hearing Exhibit 62.

¹¹ Hearing Exhibit 66 (filed under seal).

MLGW.¹² A&L removed and retained the appendices to the proposal upon completion of the presentation.¹³

On March 2, 1999, A&L entered into another agreement with ADL for a set fee to define the parameters and components of the telecommunications venture.¹⁴

On March 4, 1999, the Board of Commissioners of MLGW approved the establishment of a telecommunications entity.¹⁵ On March 30, 1999, MLGW and A&L entered into a letter agreement whereby MLGW would reimburse A&L for fees and expenses related to A&L's independent investigation into the development of a telecommunications business with MLGW and A&L would own ADL's work product, but MLGW could review it.¹⁶ On April 5, 1999, MLGW signed a letter of intent to form a strategic partnership with A&L.¹⁷

On April 19, 1999, ADL invoiced A&L for \$120,000.00 in professional services and expenses.¹⁸ On April 26, 1999, A&L invoiced MLGW for \$120,000.00 in professional services and expenses.¹⁹ A&L expanded its contract with ADL on April 30, 1999 increasing the amount of fees payable to ADL for services.²⁰ On May 18, 1999, MLGW paid A&L \$120,000.00.²¹ ADL invoiced A&L for \$330,000.00 on May 25, 1999 for professional services and expenses.²² On June 1, 1999, A&L Underground, Inc.²³ invoiced MLGW \$330,000.00 for professional

¹² Hearing Exhibit 62.

¹³ Transcript of Proceedings, July 20, 2000, v. IV-A, p. 27 (Hearing - Cross-Examination of Alex Lowe).

¹⁴ Hearing Exhibit 66 (filed under seal).

¹⁵ Hearing Exhibit 1 (*Application and Joint Petition*, Exhibit D).

¹⁶ Hearing Exhibit 67.

¹⁷ Hearing Exhibit 43.

¹⁸ Hearing Exhibit 68.

¹⁹ *Id.*

²⁰ Hearing Exhibit 66 (filed under seal).

²¹ Hearing Exhibit 68.

²² *Id.*

²³ Alex Lowe is the President of A&L Underground, which is a construction company. Transcript of Proceedings, July 19, 2000, v. III-D, p. 235 (Hearing - Direct Examination of Alex Lowe); Transcript of Proceedings, Sept. 12, 2000, v. VI-B, p. 79 (Hearing-Cross-Examination of Alex Lowe).

services and expenses.²⁴ A&L paid ADL \$120,000.00 on June 4, 1999. On June 18, 1999, MLGW paid A&L Underground, Inc. \$330,000.00.²⁵ A&L paid ADL \$330,000.00 on June 28, 1999.²⁶

In June 1998, A&L Underground, Inc. began installation of conduit in approximately thirty-five (35) subdivisions located in municipalities around Memphis. A&L completed the projects in December 1999.²⁷

On August 18, 1999, MLGW publicly announced its intention to enter into a private joint venture with A&L to build a wholesale, carriers' carrier network.²⁸ On August 19, 1999, the MLGW Board of Commissioners approved and authorized the establishment of a Telecommunications Division and approved an inter-division loan of twenty million dollars (\$20,000,000.00) from the Electric Division to the Telecommunications Division.²⁹ On October 6, 1999, Larry Thompson of MLGW briefed John Bobango, Chairman of the General Services and Utilities Committee of the Memphis City Council, regarding MLGW's telecommunications project.³⁰

On October 11, 1999, Networkx entered into a lease for office space.³¹ On October 19 and 20, 1999, Networkx contracted with two different companies for consultation services.³²

On October 21, 1999, the Board of Commissioners of MLGW provided for the interim funding of Networkx's expenses pending receipt of regulatory approval and directed that such

²⁴ Hearing Exhibit 68.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Hearing Exhibit 52.

²⁸ A carriers' carrier network is a network of facilities that is built and owned by one carrier who leases the network facilities and/or capacity to other carriers.

²⁹ Hearing Exhibit 1 (*Application and Joint Petition*, Exhibit D, minutes of meeting).

³⁰ Transcript of Proceedings, Sept. 15, 2000, v. IX-A, pp. 27-36 (Hearing - Cross-Examination of Larry Thompson).

³¹ Hearing Exhibit 5 (filed under seal).

³² Hearing Exhibit 5 and 66 (filed under seal).

expenses would be reimbursed from the inter-division loan upon receipt of all necessary regulatory approval.³³ On November 4, 1999, MLGW reimbursed A&L approximately seven hundred thousand (\$700,000.00) for costs.³⁴ On November 8, 1999, MLGW and A&L entered into an Operating Agreement for the purpose of creating and operating Networkx,³⁵ and Networkx filed its organizational papers with the Tennessee Secretary of State's office.³⁶ On December 7, 1999, the Memphis City Council approved MLGW's "Year 2000 Budget," which included a single line item reference to the twenty million dollar (\$20,000,000.00) inter-division loan.³⁷

On November 17, 2000, A&L and Broadband enter into a "Membership Interest Purchase Agreement."³⁸ On November 29, 2000, MLGW, Broadband, and A&L executed an "Assignment of Membership Interest and Amendment to Operating Agreement of Memphis Networkx, LLC" in which A&L transferred its entire interest in Networkx to Broadband.³⁹

III. PROCEDURAL HISTORY

On November 24, 1999, MLGW, A&L, and Networkx filed an *Application and Joint Petition* requesting that the Authority approve the Operating Agreement entered into by MLGW and A&L to create Networkx and grant a Certificate of Public Convenience and Necessity to Networkx to provide intrastate telecommunications services. NEXTLINK Tennessee, Inc. ("NEXTLINK") filed a petition to intervene on December 9, 1999.

The Authority first addressed this docket at a regularly scheduled Authority Conference held on December 20, 1999. At that Conference, the Directors voted unanimously to appoint General Counsel or his designee to act as the Pre-Hearing Officer to render decisions on petitions

³³ Hearing Exhibit 3.

³⁴ Hearing Exhibit 25.

³⁵ Hearing Exhibit 1 (*Application and Joint Petition*, Exhibit E).

³⁶ Hearing Exhibit 1 (*Application and Joint Petition*, Exhibit B) and 21.

³⁷ Hearing Exhibit 17.

³⁸ Hearing Exhibit 114.

³⁹ *Id.*

for intervention, hear preliminary matters prior to the Hearing, and set a procedural schedule to completion.⁴⁰

On January 11, 2000, MLGW, A&L, and Networx filed supplemental documentation in support of their *Application and Joint Petition*. On February 4, 2000, MLGW, A&L, and Networx filed the pre-filed testimony of J. Maxwell Williams, Vice President and General Counsel of MLGW, and Ward Huddleston, Jr., Chief Executive Officer and Chief Manager of Networx, in support of their *Application and Joint Petition*. On February 8, 2000, the Authority issued a Notice setting a Pre-Hearing Conference for February 17, 2000. The Notice advised any interested party to file a petition to intervene by February 15, 2000 and directed any interested party and each current party to file a list of proposed issues to be considered at the Pre-Hearing Conference.

Petitions to Intervene were filed on February 15, 2000, pursuant to the Notice, by Time Warner Telecom of the Mid-South, L.P. ("Time Warner Telecom"), Time Warner Communications of the Mid-South, L.P. ("Time Warner Communications"), the Tennessee Cable Telecommunications Association ("TCTA"), and BellSouth Telecommunications, Inc. ("BellSouth"). On February 15, 2000, lists of proposed issues were filed by MLGW, A&L, and Networx as well as NEXTLINK, Time Warner Telecom, Time Warner Communications, and TCTA.

Pursuant to the Authority's Notice, a Pre-Hearing Conference was held on February 17, 2000. Extensive discussions surrounding the issues list⁴¹ and the procedural schedule necessitated a second day, and the Pre-Hearing Conference was not concluded until February 22, 2000.

⁴⁰ *Order Appointing a Pre-Hearing Officer*, p. 1 (Jan. 5, 2000).

⁴¹ BellSouth presented a list of issues at the Pre-Hearing Conference on February 17, 2000 and filed its list on February 18, 2000.

During the Conference, the Pre-Hearing Officer considered and, without objection, granted all pending requests for intervention.⁴² Based upon the filings of and discussions with the parties during the Pre-Hearing Conference, the Pre-Hearing Officer established the following nine issues to guide the Authority in its consideration of the *Application and Joint Petition*:

1. Does Applicant meet the statutory criteria and requirement set forth in Tenn. Code Ann. § 65-4-201, for a certificate to operate as a competitive local exchange carrier in Tennessee?
2. Whether Joint Petitioners and Applicant have complied with the criteria set forth in Tenn. Code Ann. § 7-52-103(d) and whether the Operating Agreement of Memphis Networkx, LLC, dated November 8, 1999, adopted by MLG&W and A&L should be approved by the TRA?
3. What requirements, if any, are necessary to insure that start up expenses, already incurred, are correctly identified and properly allocated?
4. Does the MLG&W interest in Memphis Networkx, LLC violate Article 2, Section 29 of the Tennessee Constitution?
5. To what extent, if any, is MLG&W's participation as a member of Memphis Networkx, LLC in the proposal to offer telecommunications services affected by its charter and that of the City of Memphis?
6. Whether MLG&W and Memphis Networkx have complied with the provisions of Tenn. Code Ann. §§ 7-52-402 through 405.
7. What conditions, rules and/or reporting requirements, if any, are necessary to insure compliance by MLG&W and Memphis Networkx with the provisions of Tenn. Code Ann. §§ 7-52-402 through 405?
8. What conditions, rules or reporting requirements, if any, are necessary to insure Applicant's and Petitioners' compliance with the prohibition against anti-competitive practices provision of Tenn. Code Ann. § 7-52-103(d)?
9. What conditions, rules or reporting requirements, if any, are necessary to insure Applicant's and Petitioners' compliance, to the extent applicable, with Tenn. Code Ann. § 65-5-208(c)?⁴³

The Pre-Hearing Officer also established a procedural schedule which called for the completion of discovery and the filing of all testimony by March 21, 2000 with the dates of March 29 and

⁴² *Report and Recommendation of Pre-Hearing Officer*, p. 3 (Mar. 9, 2000); *Initial Order Granting Petitions to Intervene*, p. 4 (Mar. 9, 2000). TDS TELECOM Companies ("TDS Telecom") filed a *Petition to Intervene* on February 23, 2000. The Pre-Hearing Officer issued a letter on February 25, 2000 requesting any comments or objections to TDS Telecom's intervention be filed no later than February 29, 2000. MLGW, A&L, and Networkx filed a response on February 29, 2001, in which they requested that TDS Telecom's participation be limited by the scheduling order and issues list. The Pre-Hearing Officer subsequently granted the petition. *Initial Order Granting Petitions to Intervene*, p. 4 (Mar. 9, 2000) (attached to *Report and Recommendation of Pre-Hearing Officer* as Exhibit 1).

⁴³ *Report and Recommendation of Pre-Hearing Officer*, pp. 5-6 (Mar. 9, 2000).

30, 2000 being set aside for the Hearing. By agreement between the parties specific dates for propounding discovery and filing documentation were extended within the framework of the procedural schedule.

On March 16, 2000, NEXTLINK requested the attendance of nine witnesses, including Alex Lowe; Wade Stinson, Vice President of Construction and Maintenance for MLGW; and Larry Thompson, for cross-examination at the Hearing. On March 17, 2000, Time Warner Telecom, Time Warner Communications, and TCTA filed a *Request to Conduct Discovery Depositions* of John McCullough, Senior Vice President, Chief Financial Officer, and Secretary/Treasurer for MLGW; Wade Stinson; Larry Thompson; Joel Halverson; and Alex Lowe. On March 22, 2000, Time Warner Telecom, Time Warner Communications, and TCTA requested that the Authority subpoena MLGW's, A&L's, and Networx's records custodians. MLGW, A&L, and Networx opposed all of these requests. On March 24, 2000, MLGW, A&L, and Networx filed the pre-filed rebuttal testimony and exhibits of Ward Huddleston, Jr., J. Maxwell Williams, John McCullough, and Wade Stinson.

The Pre-Hearing Officer convened a Status Conference on March 24, 2000 for the purpose of acting on the requests of the intervenors. During the Status Conference, the intervenors acknowledged that their requests overlapped as to some witnesses and proffered that if the parties could meet to authenticate certain records while reserving relevancy objections, the requests to subpoena the records custodians would be withdrawn. In addition, after discussions, the original number of witnesses requested to appear at the Hearing and requested for depositions was reduced to two: Alex Lowe and Larry Thompson. NEXTLINK, Time Warner Telecom, Time Warner Communications, and TCTA proposed the options that Mr. Lowe and Mr. Thompson be deposed in advance of the Hearing or cross-examined at the Hearing. MLGW, A&L, and Networx opposed the depositions and live hearing appearance, asserting that any testimony from these two witnesses would not be relevant to the issues or duplicative of

previously-filed testimony. Because MLGW, A&L, and Networx filed their rebuttal testimony one day before the Status Conference, counsel suggested that the other parties review that testimony to determine whether the testimony of Alex Lowe and Larry Thompson would be required. The Pre-Hearing Officer determined that any party seeking the testimony of Alex Lowe or Larry Thompson should file on March 27, 2000, a list of the inconsistencies between the pleadings, the responses to data requests, and the pre-filed testimony. The Pre-Hearing Officer determined that the Status Conference should be continued to allow the parties to make filings in support of their positions as to obtaining testimony from the two witnesses.⁴⁴ Because of the disputes between the parties and the need for the resolution of other matters important to the preparation of this case for a Hearing, the Pre-Hearing Officer continued the Hearing from March 29 and 30, 2001.⁴⁵ The Pre-Hearing Officer did not reschedule the Hearing, but proposed the dates of April 4 and 5 or April 12, 13 and 14 as possible dates depending on the Authority's calendar.

The Status Conference was reconvened on March 29, 2000. After reviewing filings by the parties and hearing extensive argument, the Pre-Hearing Officer determined that NEXTLINK, Time Warner Communications, Time Warner Telecom, and TCTA made a sufficient showing to demonstrate that certain testimony of Larry Thompson and Alex Lowe would be relevant to the issues in this proceeding and would not be duplicative of previously filed testimony and permitted those parties to depose the witnesses for the purpose of presenting

⁴⁴ *Pre-Hearing Order Reflecting Action Taken at Pre-Hearing and Status Conferences Held on March 24, 2000, March 29, 2000 and April 5, 2000 and Decisions on Motions in Limine and Objections to Pre-Filed Testimony and Exhibit*, p. 5 (April 28, 2000).

⁴⁵ *Id.* at 6.

their testimony at the Hearing.⁴⁶ At the request of MLGW, A&L, and Networx, the Pre-Hearing Officer made himself available to attend the depositions to rule on objections.

To facilitate the expeditious presentation of evidence at the Hearing and to address MLGW, A&L, and Networx's concerns over having their witnesses prepared to address specific documents, the Pre-Hearing Officer ordered that the parties either provide to each other a list of exhibits to be presented at the Hearing or make those exhibits available for copying or inspection by March 31, 2000.⁴⁷ The Pre-Hearing Officer determined that a Pre-Hearing Conference would be held in advance of the depositions to address objections to pre-filed testimony and exhibits and any motions in limine as to the testimony of witnesses. The parties were also directed to file objections and motions in limine prior to this Pre-Hearing Conference.

On March 31, 2000, BellSouth filed a letter in this docket explaining that it would not be presenting any witnesses or exhibits, but reserved its right to use documents for impeachment. Also on March 31, 2000, MLGW, A&L, and Networx filed a *List of Documents That May be Introduced by Applicant and Joint Petitioners in Tennessee Regulatory Authority Docket No. 99-00909* and Time Warner Communications, Time Warner Telecom, and TCTA filed their list of additional exhibits.

On April 3, 2000, the parties filed numerous discovery pleadings. Time Warner Communications, Time Warner Telecom, and TCTA filed a motion in limine "as to evidence relating to the proposed AOL/Time Warner merger, or the cross-subsidization of products or services by any Time Warner affiliate."⁴⁸ Time Warner Communications, Time Warner Telecom, and TCTA also filed objections to the rebuttal testimony of J. Maxwell Williams,

⁴⁶ *Id.* at 7-8.

⁴⁷ *Id.* at 8.

⁴⁸ *Time Warner Telecom of the Mid-South, L.P.'s, Time Warner Communications of the Mid-South's, and the Tennessee Cable Telecommunications Association's Motion in Limine*, p. 1 (Apr. 3, 2001).

Ward Huddleston, Jr., Wade Stinson, and John McCullough and motions to strike. MLGW, A&L, and Networx filed a motion in limine along with a memorandum of support, objections to exhibits of William J. Barta, and objections to the requests to produce documents at the depositions. Also on April 3, 2000, the Authority issued a *Notice of Hearing* to all interested parties informing them that the Hearing in this matter had been scheduled for April 13 and 14, 2000.

On April 4, 2000, the International Brotherhood of Electrical Workers, Local 1288 ("IBEW") filed a petition to intervene.

On April 5, 2000, the morning of the Pre-Hearing Conference, the Pre-Hearing Officer, received copies of Time Warner Communications, Time Warner Telecom, and TCTA's requests to produce documents at the depositions of Alex Lowe and Larry Thompson. During the Conference, the Pre-Hearing Officer afforded the parties an opportunity to comment on the production of documents for the depositions. The Pre-Hearing Officer ruled that Alex Lowe and Larry Thompson should bring any documents in their possession pertaining to these proceedings to the depositions and that Time Warner Telecom, Time Warner Communications, and TCTA would have an opportunity during the depositions to inquire about any other documents in existence.⁴⁹

On the morning of April 6, 2000, the parties, Larry Thompson, Alex Lowe, and the Pre-Hearing Officer appeared in the Hearing Room of the Authority for the depositions. Counsel for Time Warner Telecom, Time Warner Communications, and TCTA requested that the rule of sequestration of witnesses be imposed in as much as the depositions were being taken for the purpose of obtaining testimony for the Hearing. At that time, counsel for MLGW, A&L, and

⁴⁹ *Pre-Hearing Order Reflecting Action Taken at Pre-Hearing and Status Conferences Held on March 24, 2000, March 29, 2000 and April 5, 2000 and Decisions on Motions in Limine and Objections to Pre-Filed Testimony and Exhibit*, p. 12 (April 28, 2000).

Networx designated Mr. Thompson as the corporate representative for MLGW, Ward Huddleston as the corporate representative for Networx, and Alex Lowe as the corporate representative for A&L. After some discussion, MLGW, A&L, and Networx proposed that the deponents appear at the Hearing to present live testimony rather than give their depositions. Time Warner Telecom, Time Warner Communications, TCTA, and NEXTLINK agreed to the offer, and the parties cancelled the depositions.

After the cancellation of the depositions on April 6, 2000, the Pre-Hearing Officer advised the parties that he would review the filings of the parties, consider the oral arguments, and issue an order reflecting his rulings on the motions in limine and the objections to pre-filed testimony and exhibits.⁵⁰ During the time that had been set aside for the depositions, the Pre-Hearing Officer facilitated discussions between the parties for the purposes of entering into stipulations of fact and reaching agreements as to the authenticity of documents. Although there was dialogue between the parties, they failed to reach any stipulations.

As a result of the occurrences on April 6, 2000, the Pre-Hearing Officer notified the parties in writing on April 7, 2000 that the Hearing scheduled for April 13 and 14, 2000 would need to be rescheduled to allow for the additional time needed for two extra witnesses. The Pre-Hearing Officer's decision was memorialized in an Order issued on April 10, 2000.⁵¹

Upon the filing of the April 10th Order, MLGW, A&L, and Networx filed an appeal to the Authority. At their request, the Directors of the Authority heard the appeal at a regularly scheduled Authority Conference on April 11, 2000. After considering the argument of the parties, the Directors voted two to one to continue the Hearing and rescheduled the Hearing for the week of May 1, 2000.⁵²

⁵⁰ *Id.* at 14-42.

⁵¹ *Pre-Hearing Officer's Order Continuing Hearing*, p. 2 (Apr. 10, 2000).

⁵² Transcript of Proceedings, Apr. 11, 2000, pp. 91-96 (Authority Conference).

On April 14, 2000, Time Warner Communications filed a *Motion for Order to Allow Additional Discovery and to Amend Procedural Schedule*, together with exhibits. MLGW, A&L, and Networx filed a response on April 17, 2000. The Pre-Hearing Officer denied the motion on the grounds that, in his opinion, when the Authority moved the hearing date to allow more time for the hearing it did not intend to provide an additional period for new discovery in advance of the new hearing dates. Further, the Pre-Hearing Officer determined the information could be elicited at the time of the hearing from witnesses already scheduled to testify.⁵³

On April 20, 2000, the Pre-Hearing Officer entered a Protective Order and issued subpoenas duces tecum for the records custodians of MLGW, Networx, and A&L to produce the requisite documents at the Hearing.

On April 24, 2000, Time Warner Communications filed a letter with the Authority requesting that the Pre-Hearing Officer's order denying the Motion for Additional Discovery be vacated. Time Warner Communications argued that the ability of the intervening parties to fully present relevant proof at the Hearing would be materially and substantially impaired should the requested depositions not take place.

The Directors addressed Time Warner Communications' letter at a regularly scheduled Authority Conference on April 25, 2000. Following extensive discussions, the Directors, by a two to one vote, granted Time Warner Communications' request to vacate the Pre-Hearing Officer's order and proceed with discovery depositions of five (5) witnesses, Alex Lowe, Wade Stinson, Ward Huddleston, John McCullough, and Larry Thompson, on April 27 and 28, 2000 in Memphis.⁵⁴

⁵³ *Order Denying Motion to Allow Additional Discovery and to Amend Procedural Schedule*, p. 4 (Apr. 19, 2000).

⁵⁴ Director Malone voted to affirm the *Order Denying Motion to Allow Additional Discovery and to Amend the Procedural Schedule*. *Order Vacating Order Denying Motion to Allow Additional Discovery and to Amend Procedural Schedule*, p. 2 (Apr. 28, 2000).

Also at the April 25, 2000 Authority Conference, MLGW, A&L, and Networx made an *ore tenus* motion to quash the *subpoenas duces tecum* for records custodians. MLGW, A&L, and Networx asserted that some of the documents requested for production had already been produced and that the request was overly burdensome. Following argument from the parties, the Directors voted unanimously to deny the motion to quash. Further, the majority of the Directors who voted that depositions should occur determined that the records custodians should appear at the depositions and produce the requested records on April 27, 2000.⁵⁵

On April 25, 2000, the Pre-Hearing Officer issued an Order granting the IBEW's petition to intervene, but limited its intervention to presenting a statement of its position and conducting limited cross-examination of witnesses testifying during the Hearing.⁵⁶

A Pre-Hearing Conference was held on April 28, 2000 during which the Pre-Hearing Officer determined the order of witnesses and addressed several preliminary matters.

On May 1, 2000, the Authority convened the Hearing in this docket. At the outset, the Directors unanimously voted to approve the Pre-Hearing Officer's *Pre-Hearing Order Reflecting Action Taken at Pre-Hearing and Status Conferences Held on March 24, 2000, March 29, 2000 and April 5, 2000 and Decisions on Motions in Limine and Objections to Pre-Filed Testimony and Exhibits*.⁵⁷ Thereafter, the parties requested a postponement of the commencement of the Hearing to permit the parties to continue settlement negotiations. The Directors voted unanimously to permit the parties to use May 1 to finalize their settlement negotiations.⁵⁸

On May 2, 2000, MLGW, A&L, Networx, NEXTLINK, Time Warner Communications, Time Warner Telecom, and TCTA filed a settlement agreement titled *Amended Application of*

⁵⁵ *Id.* at 3.

⁵⁶ *Pre-Hearing Officer's Order Granting Petition to Intervene of the International Brotherhood of Electrical Workers, Local 1288*, p. 7 (Apr. 25, 2000).

⁵⁷ Transcript of Proceedings, May 1, 2000, v. I-A, p. 4.

⁵⁸ *Id.* v. I-B, pp. 25-27.

Memphis Networx LLC ("Amended Application"). The Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter ("Consumer Advocate") filed a letter suggesting that the Amended Application be published to provide sufficient notice to the public. After hearing comments from the parties, a majority of the Directors⁵⁹ voted to postpone the Hearing and to remand the docket to the Pre-Hearing Officer. The Directors instructed the Pre-Hearing Officer to conduct a Status Conference for the purposes of: establishing a new procedural schedule; determining the current positions of the parties; and developing a framework for determining whether Authority Staff should assume the role of a party in this action in order to present evidence and cross-examine witnesses on issues that were no longer supported by the intervening parties.⁶⁰

The Pre-Hearing Officer convened a Status Conference on May 2, 2000 following the postponement of the Hearing. During the conference, the parties presented their respective positions as to what the intervenors' continued roles would be relative to the Hearing in light of the Amended Application. Based upon the parties' comments, the Pre-Hearing Officer ordered each party to file a written explanation as to how the Amended Application resolved the nine issues being considered in this docket and determined that the Hearing would be postponed until after the parties submitted specific filings to the Authority in accordance with a procedural schedule established during the Status Conference. On May 4, 2000, the Pre-Hearing Officer issued an *Order Reflecting Action Taken at May 2, 2000 Status Conference*.

During the May 2, 2000 Status Conference, counsel for the IBEW requested that the IBEW's intervention status be expanded to permit the IBEW to present its own testimony at the Hearing. Also, on May 5, 2000, the Consumer Advocate filed a *Petition to Intervene*. On May

⁵⁹ *Id.* May 2, 2000, v. II-A, p. 39 (Hearing). Chairman Melvin Malone voted to proceed with the Hearing as scheduled.

⁶⁰ *Order Reflecting Action Taken at May 2, 2000 Status Conference*, p. 3 (May 4, 2000).

8, 2000, the parties to the settlement, with the exception of NEXTLINK, filed their respective position statements as to Amended Application. On May 11, 2000, MLGW, A&L, and Networx filed supplemental pre-filed testimony on behalf of Ward Huddleston, Jr., J. Maxwell Williams, and John McCullough and pre-filed testimony on behalf of Alex Lowe, Wade Stinson, and Michael D. Whitten, General Auditor for MLGW.

On May 12, 2000, MLGW, A&L, and Memphis Network responded to the Consumer Advocate's petition to intervene and filed a request to deny the expansion of the IBEW's role as an intervenor. MLGW, A&L, and Networx also sought to have the case reset for Hearing. The IBEW filed a reply on May 18, 2000.

On May 22, 2000, the Pre-Hearing Officer issued an order granting the IBEW's request for an expanded role and the Consumer Advocate's petition to intervene, but limited their presentation of testimony to one (1) witness each. Both parties were directed to file pre-filed testimony on May 30, 2000, with MLGW, A&L, and Networx being ordered to file rebuttal testimony on June 6, 2000.⁶¹

On May 30, 2000, the Consumer Advocate filed pre-filed direct testimony on behalf of Archie R. Hickerson, former Director of the Consumer Advocate Division Staff, and on June 1, 2000, the IBEW filed the pre-filed testimony of Brent E. Hall, President of the IBEW. On June 6, 2000, MLGW, A&L, and Networx filed the pre-filed rebuttal testimony of Larry Thompson, Wade Stinson, John McCullough, and Ward Huddleston.

Also on June 6, 2000, MLGW, A&L, and Networx filed Objections and a Motion to Strike portions of Brent E. Hall's pre-filed testimony relating to the alleged violations of the Memorandum of Understanding between MLGW and the IBEW. In a response filed on June 12,

⁶¹ *Pre-Hearing Officer's Order Expanding Intervention of International Brotherhood of Electrical Workers, Local 1288 and Granting Consumer Advocate Division's Petition to Intervene*, p. 5 (May 22, 2000).

2001, the IBEW asserted that issues involving labor relations among the IBEW, MLGW, and the proposed joint venture would impact not only the interests and legal rights of the members of the IBEW, but those of the general public.

On June 1, 2000, Time Warner Telecom, Time Warner Communications, and TCTA filed a *Motion for Bifurcated Hearing Schedule*. On June 5, 2000, MLGW, A&L, and Networx filed a letter with the Authority requesting to be heard at the June 6th Authority Conference for the purpose of setting a Hearing date. During the June 6, 2000 Authority Conference, the Directors permitted MLGW, A&L, and Networx to present their request and instructed the Pre-Hearing Officer to hold a Status Conference to discuss with all parties the resetting of this case for Hearing.⁶²

In compliance with the directive, the Pre-Hearing Officer convened a Status Conference on June 6, 2000, with all parties participating. The comments of all parties regarding the *Motion for Bifurcated Hearing Schedule* revealed a significant difference of opinion between the parties as to how the Authority should consider the Amended Application in the context of the Hearing. The Pre-Hearing Officer instructed the parties to meet in an attempt to resolve the issues raised by the *Motion for Bifurcated Hearing Schedule*.

On June 7, 2000, MLGW, A&L, Networx, and the Consumer Advocate filed responses to the *Motion for Bifurcated Hearing Schedule*. The IBEW filed its opposition on the following day. On June 9, 2000, the parties informed the Pre-Hearing Officer that they no longer supported the Amended Application and that it would be withdrawn. On June 12, 2000, MLGW, A&L, and Networx filed a letter withdrawing the Amended Application and advising the Authority that they wished to proceed to Hearing on the original Application.

⁶² Transcript of Proceedings, Jun. 6, 2000, pp. 56-57 (Authority Conference).

On June 19, 2000, Authority Staff filed a memorandum stating that it would not need to participate in this docket as a party. The Authority issued a *Notice of Hearing and Pre-Hearing Conference* on June 22, 2000 scheduling a Pre-Hearing Conference for July 6, 2000 and re-scheduling the Hearing for July 17, 18, 19 and 20, 2000. On June 29, 2000, Time Warner Telecom, Time Warner Communications, and TCTA filed a *Motion to Reschedule Hearing* asserting that their expert witness, William Barta, was unavailable for the Hearing.

On July 6, 2000, MLGW, A&L, and Networx filed pre-filed rebuttal testimony of Wade Stinson, Ward Huddleston, Jr., J. Maxwell Williams, and John McCullough.

During the July 6, 2000 Pre-Hearing Conference and in the *Order Re: Pending Pre-Hearing Motions* issued on July 12, 2000, the Pre-Hearing Officer ruled on certain outstanding motions.⁶³ As to the Objections and Motion to Strike portions of Brent E. Hall's pre-filed testimony, the Pre-Hearing Officer granted the motion in part and denied the motion in part. The Pre-Hearing Officer found that certain portions of Mr. Hall's pre-filed testimony question the intent of MLGW regarding future ventures. The Pre-Hearing Officer determined that MLGW's intentions in entering into the joint venture and the impact of such intentions on the Memorandum of Understanding are not material to the issues under consideration in this case. The Pre-Hearing Officer agreed that the General Assembly has acted to permit MLGW to enter into joint ventures, so intent is not material in this proceeding. As for the remaining testimony, the Pre-Hearing Officer determined that the direct testimony of Brent E. Hall permits the IBEW to present its concerns in this forum as provided for in Tenn. Code Ann. § 7-52-103(d). Therefore, the Pre-Hearing Officer granted MLGW, A&L, and Networx's objection set forth in

⁶³ See *Order Re: Pending Pre-Hearing Motions*, p. 8 (July 12, 2000). On July 7, 2000, the Pre-Hearing Officer sent MLGW, A&L, Memphis Networx, Time Warner Telecom, Time Warner Communications, and TCTA a letter requesting that the additional information be filed no later than 2:00 p.m. on July 11, 2000.

paragraph 4 of the Objections and the Motion to Strike. The Pre-Hearing Officer denied the remaining objections.⁶⁴

As to the *Motion to Set Hearing and to Close Discovery* filed on June 12, 2000, the Pre-Hearing Officer found that the motion requesting the Authority reschedule the Hearing was rendered moot by the resetting of the Hearing and granted the motion to close discovery as to “new” discovery requests, ordering the parties to discuss and resolve any outstanding discovery requests.⁶⁵ During the July 6th Pre-Hearing Conference, Time Warner Telecom, Time Warner Communications, and TCTA withdrew their *Motion to Reschedule the Hearing*.⁶⁶

The Authority convened the Hearing in this docket as scheduled on July 17, 2000. At the outset of the Hearing, the Directors denied the *Motion to Lift Protective Order* filed by Time Warner Telecom, Time Warner Communications, and TCTA on May 1, 2000 and the *Motion in Limine* filed by MLGW, A&L, and Networx on July 14, 2000.⁶⁷ NEXTLINK informed the Authority during the July 17, 2000 proceedings that it was withdrawing as an intervenor because it had “resolved certain contractual issues with MLG&W” and was “comfortable with the applicant’s changes to its application to address cross-subsidization issues.”⁶⁸ The Hearing was conducted from July 17 through 20, 2000, with the Directors of the Authority hearing testimony from Ward Huddleston, Jr., J. Maxwell Williams, John McCullough, Michael D. Whitten, and Alex Lowe. On July 20, 2000, the Authority adjourned the Hearing until the next available hearing dates starting September 11, 2000.⁶⁹

⁶⁴ *Id.* at 8-10.

⁶⁵ *Id.* at 10.

⁶⁶ Transcript of Proceedings, July 6, 2000, p. 4 (Pre-Hearing Conference)

⁶⁷ *Id.* July 17, 2000, v. I-A, pp. 6-15 (Hearing).

⁶⁸ *Id.* at 52.

⁶⁹ On August 21, 2000, the Authority issued a *Notice of Hearing* setting the Hearing for September 11, 2000 through September 15, 2000.

On September 8, 2000, Time Warner Telecom, Time Warner Communications, and TCTA filed a Motion to Continue the Hearing. On September 11, 2000, the Authority reconvened the Hearing in this docket. On the morning of the Hearing, MLGW, A&L, and Networx filed a response to the Motion to Continue. Also on that morning, Time Warner Telecom, Time Warner Communications, and TCTA filed a Motion to Compel requesting that the Authority order MLGW, A&L, and Networx to provide certain documents. At the outset of the Hearing, the Directors addressed the Motion to Continue and Motion to Compel. Throughout the proceedings on September 11, 2000, the parties and the Directors discussed the nature, content, and availability of the documents that were the subject of the motions. The Authority determined that the documents should be produced and adjourned the proceedings until September 12, 2000. On September 12, 2000, counsel for MLGW and Networx reported that MLGW, A&L, and Networx had produced the documents;⁷⁰ however, after reviewing the documents, Time Warner Telecom, Time Warner Communications, and TCTA argued that the documentation was incomplete and asked the Authority to dismiss the case and award attorneys fees and costs.⁷¹ After hearing arguments from both sides, the Authority took the motion under advisement.⁷² On September 14, 2000, the Authority directed MLGW, A&L, and Networx either to produce the missing documentation or to file affidavits explaining any failure to do so.⁷³ From September 12 through 15, 2000 the Authority heard testimony from Archie Hickerson, Alex Lowe, Brent E. Hall, and Larry Thompson.

⁷⁰ Transcript of Proceedings, September 12, 2000, v. VI-B, p. 56 (Hearing).

⁷¹ *Id.* September 13, 2000, v. VII-A, pp. 3-5, 17, 25 (Hearing).

⁷² *See id.* at 28.

⁷³ The Authority issued a *Notice of Filing and Hearing* on September 15, 2000 confirming these dates.

On September 19, 2000, MLGW, A&L, and Networx filed the affidavits of Larry Thompson, Ward Huddleston, Joel Halverson, Alex Lowe, and Joseph Warnement concerning the production of documents.⁷⁴ On September 21, 2000, Time Warner Telecom, Time Warner Communications, and TCTA filed a second *Motion to Lift Protective Order*. Immediately following the Authority Conference on September 26, 2000, the Authority convened a hearing to dispose of all outstanding motions. At issue was the motion to dismiss and award attorney fees and the *Motion to Lift Protective Order*. After hearing oral arguments, the Authority denied the motion to dismiss and award attorney's fees⁷⁵ and denied the *Motion to Lift Protective Order*.⁷⁶ On October 5, 2000, the Authority issued a *Notice of Hearing*, which scheduled the conclusion of the Hearing for October 16 through October 20, 2000.

On October 12, 2000, MLGW, A&L, and Networx filed a *Motion Show Cause-Violation of Protective Order* alleging that counsel for Time Warner Telecom and Time Warner Communications had released protected information to a Memphis newspaper. Time Warner Telecom, Time Warner Communications, and TCTA filed a response to the motion on October 15, 2000 along with an affidavit of John M. Farris. MLGW, A&L, and Networx filed a memorandum in support of their motion on October 17, 2000. In the motion and memorandum, MLGW, A&L, and Networx requested that the Authority order counsel for Time Warner Telecom and Time Warner Communications to show cause why he should not be held in violation of the Protective Order and subject to sanctions as a result thereof.

The Hearing was reconvened on October 16, 2000. At the outset of the Hearing the Directors stated that they would take the Motion to Show Cause under advisement.⁷⁷ On

⁷⁴ MLGW, A&L, and Networx filed a second copy of Joseph Warnement's affidavit on September 20, 2000 because it contained a more legible copy of an exhibit.

⁷⁵ Transcript of Proceedings, Sept. 26, 2000, p. 16 (Hearing).

⁷⁶ *Id.* at 27-29.

⁷⁷ *Id.* Oct. 16, 2000, v. X-A, p. 3 (Hearing).

October 17, 2000, at the close of MLGW, A&L, and Networx's case-in-chief, Time Warner Telecom, Time Warner Communications, and TCTA orally moved to dismiss the case.⁷⁸ After hearing the response of MLGW, A&L, and Networx, the Authority voted unanimously to deny the motion to dismiss.⁷⁹

At the start of the Hearing on October 19, 2000, MLGW, A&L, and Networx notified the Authority that it wished to file an amendment to the operating agreement deleting the call option provision, Section 11.6.⁸⁰ After hearing testimony on the amendment, the Authority entered the amendment into the record as Exhibit 112. Thereafter, the parties presented their closing arguments. Prior to adjourning the Hearing, the Authority remanded the Motion to Show Cause to the Pre-Hearing Officer.⁸¹

On October 25, 2000, the Authority issued the *Notice of Issues for Briefing* directing the parties to file post-hearing briefs on four listed issues. On November 17, 2000, the IBEW filed its post-hearing brief, and MLGW, A&L, and Networx filed a *Notice of Additional Material Evidence and Motion for Suspension of Deadline for Filing of Briefs and Finding of Facts and Conclusions of Law*. The Notice and Motion stated that A&L had agreed to sell its interest in Networx to Memphis Broadband, LLC ("Broadband") and that MLGW and Broadband intended to amend the *Application and Joint Petition*. On November 20, 2000, Time Warner Telecom, Time Warner Communications, and TCTA filed their response reserving their right to object, conduct further discovery, and conduct further hearings.

During a regularly scheduled Authority Conference on November 21, 2000, the Directors voted unanimously to remand the case to the Pre-Hearing Officer to rule on all preliminary

⁷⁸ *Id.* Oct. 17, 2000, v. XI-A, p. 33 (Hearing).

⁷⁹ *Id.* v. XI-B, pp. 3-4 (Hearing).

⁸⁰ *Id.* Oct. 19, 2000, v. XIII-A, p. 76 (Hearing).

⁸¹ *Id.* v. XIII-B, pp. 101-02 (Hearing).

matters not involving the merits of the case.⁸² On December 7, 2000, the IBEW filed a Motion to Withdraw. The IBEW explained in its motion that the sale of A&L's interest to Broadband "has alleviated the concerns of the IBEW with the Application of Memphis Networkx, LLC, as expressed in its Petition to Intervene."⁸³

On December 21, 2000, MLGW, Broadband, and Networkx filed their *Amendment to the Application of Memphis Networkx, LLC and Joint Petition of MLGW and A&L* ("Second Amended Application"). Along with the Second Amended Application, MLGW, Broadband, and Networkx submitted the pre-filed testimony of Andrew P. Seamons on behalf of Broadband and the pre-filed supplemental testimony of Ward Huddleston, Jr. and Larry Thompson on the behalf of Networkx and MLGW, respectively. The Second Amended Application stated that A&L had sold its membership interest in Networkx to Broadband and provided specific amendments to the *Application and Joint Petition*. The Second Amended Application also included the "Amended and Restated Operating Agreement of Memphis Networkx, LLC."

Having received no comments or filings from the intervening parties relating to the Second Amended Application, with the exception of the IBEW's Motion to Withdraw, the Pre-Hearing Officer scheduled a Pre-Hearing Conference for January 29, 2001. During the Pre-Hearing Conference, the Pre-Hearing Officer considered the IBEW's Motion to Withdraw and, upon hearing no objections, granted the motion. In addition, the Pre-Hearing Officer determined that the IBEW's post-hearing brief and the evidence presented by or elicited from the IBEW and its witnesses would remain a part of the record in this proceeding. Because MLGW, Broadband, and Networkx objected to this decision, the Pre-Hearing Officer permitted MLGW, Broadband,

⁸² *Id.* Nov. 21, 2000, pp. 31-35 (Authority Conference).

⁸³ *Motion to Withdraw and Dismiss Petition to Intervene of International Brotherhood of Electrical Workers, Local 1288*, p. 1, (December 7, 2000).

and Networx to submit a filing setting forth legal grounds for their objections. Time Warner Telecom, Time Warner Communications, and TCTA requested the opportunity to respond.⁸⁴

After hearing from the parties, the Pre-Hearing Officer determined that additional discovery and pre-filed testimony would be necessary as a result of the filing of the Second Amended Application, but limited the scope of such discovery to the new issues raised in the Second Amended Application and pre-filed testimony submitted therewith.⁸⁵ The Pre-Hearing Officer, with the assistance of the parties, established a procedural schedule which called for completion of discovery and the filing of all pre-filed testimony by March 1, 2001. The Pre-Hearing Officer also determined that any depositions must be completed prior to March 1, 2001 and directed the parties to file briefs on three (3) threshold issues no later than March 1, 2001.⁸⁶ Lastly, at the request of MLGW, Broadband, and Networx, the Pre-Hearing Officer set this

⁸⁴ *Order Granting IBEW's Motion to Withdraw, Establishing Procedural Schedule, and Setting Hearing Date*, p. 5 (Feb. 9, 2001).

⁸⁵ *Id.* at 6.

⁸⁶ The issues are:

1.
 - a. Do Tenn. Code Ann. § 65-25-231(a)(2) and §7-52-402 apply to the Telecommunications Division of the Electric Division of Memphis Light Gas & Water?
 - b. Does Tenn. Code Ann. § 65-25-231(a)(2), § 7-52-402, or any other statute permit the equity investment in Memphis Networx by the Telecommunications Division of the Electric Division of Memphis Light Gas & Water to Memphis Networx, LLC?
2. Please identify and explain the criteria the Authority should use when approving an operating agreement under Tenn. Code Ann. § 7-52-103(d).
3.
 - a. Was Memphis Light, Gas & Water required to issue a Request for Proposal?
 - b. What procedural requirements must Memphis Light, Gas & Water follow when proceeding through the Request for Proposal process?
 - c. Assuming Memphis Light, Gas & Water was not required to issue a Request for Proposal, was it bound to follow the procedural requirements discussed in the answer to b. once it chose to issue a Request for Proposal?
 - d. Assuming Memphis Light, Gas & Water was required to issue a Request for Proposal, but failed to follow the requirements discussed in the answer to b., how is the transfer of interest from A&L Networks-Tennessee, L.L.C. to Memphis Broadband affected?

Id. at Exhibit A.

matter for Hearing beginning on March 26, 2001 and limited the scope of the Hearing to issues surrounding the Second Amended Application.⁸⁷

During the course of discovery, MLGW, Broadband, and Networx filed Objections to the Data Requests of the Time Warner Telecom, Time Warner Communications, and TCTA, which resulted in Time Warner Telecom and TCTA filing a Motion to Compel. After finding these filings incomplete, the Pre-Hearing Officer ordered the parties to supplement their filings by February 21, 2001.⁸⁸ Both parties submitted supplemental filings, and MLGW, Broadband, and Networx also filed supplemental responses to the data requests.

On February 23, 2001, Time Warner Telecom, Time Warner Communications, and TCTA requested the issuance of subpoenas duces tecum for taking the depositions of Ward Huddleston, Jr., Larry Thompson, Andrew P. Seamons, and Alex Lowe on February 28, 2001. The Pre-Hearing Officer issued the subpoenas duces tecum pursuant to the ruling at the January 29, 2001 Pre-Hearing Conference that depositions would be permitted as a part of discovery. Also on February 23, 2001, MLGW, Broadband, and Networx filed their *Memorandum of Law in Support of Objection of Memphis Networx, LLC, MLGW, Broadband, and Memphis Networx, and Memphis Broadband, LLC, to the Retention of Evidence, Filings and Arguments of the IBEW in this Proceeding Following the IBEW's Withdrawal From This Proceeding*.

On February 26, 2001, MLGW, Broadband, and Networx filed a Motion to Quash the Subpoenas and Objections to the Depositions. MLGW, Broadband, and Networx raised a number of objections including insufficient notice.

The Pre-Hearing Officer found that, under the circumstances, an undue hardship and burden would be placed on MLGW, Broadband, and Networx if the depositions were to proceed

⁸⁷ *Id.* at 7.

⁸⁸ *Order Directing Supplemental Filings*, pp. 2-3 (Feb. 16, 2001).

on February 28, 2001 and, further, that it would not be in the best interests of all parties for the depositions to proceed until the Objections thereto were resolved. Without ruling on the merits of the Objections, the Pre-Hearing Officer cancelled the depositions and held the Motion to Quash in abeyance. The Pre-Hearing Officer scheduled a Pre-Hearing Conference to consider the Objections to the Data Requests, Motion to Compel, Motion to Quash, and Objections to the Depositions.⁸⁹

On March 1, 2001, the Consumer Advocate, MLGW, Broadband, Networx, Time Warner Telecom, Time Warner Communications, and TCTA filed their pre-hearing briefs.

On March 8, 2001, the Pre-Hearing Officer convened the Pre-Hearing Conference and after discussion on numerous issues related to the discovery requests and depositions, the parties agreed to meet within twenty-four (24) hours in an attempt to resolve their disputes. The Pre-Hearing Officer accepted this agreement and ordered, the parties to file a statement or stipulation reflecting the outcome of their meeting on March 9, 2001.⁹⁰ On March 9, 2001, the parties requested an extension of the filing deadline until March 13, 2001. The Pre-Hearing Officer granted the request, cautioning the parties that the Hearing would remain scheduled to begin on March 26, 2001.

On March 13, 2001, MLGW, Broadband, Networx, Time Warner Telecom, Time Warner Communications, and TCTA filed Joint Stipulations addressing certain outstanding discovery requests and the taking of depositions. On March 15, 2001, MLGW, Broadband, and Networx supplemented their responses to data request numbers 5, 6, 7, 8, 10, 12, 17, 20, 21, 31, 32 and 38.

On March 16, 2001, the parties informed the Pre-Hearing Officer that they had reached additional agreements regarding the taking of the depositions and the production of documents.

⁸⁹ *Order Suspending Depositions Scheduled for February 28, 2001, Holding Applicant's and Joint Petitioners' Motion to Quash in Abeyance and Setting Pre-Hearing conference for March 6, 2001*, pp. 3-4 (Feb. 26, 2001).

⁹⁰ Transcript of Proceedings, Mar. 8, 2001, p. 42 (Pre-Hearing Conference).

The depositions of Andrew P. Seamons, Ward Huddleston, Jr., and Larry Thompson were taken by agreement of the parties at the offices of the Authority on March 19, 2001. During the course of and at the conclusion of the depositions, the Pre-Hearing Officer appeared before the parties to resolve any objections raised during the depositions. The Pre-Hearing Officer entered an order on March 23, 2001 regarding the outstanding discovery disputes.⁹¹

Also, on Friday, March 23, 2000, the Pre-Hearing Officer held a Pre-Hearing Conference by telephone to establish procedures for the Hearing on Monday, March 26, 2001. During the Conference, the parties raised the possibility that MLGW, Broadband, and Networx, Time Warner Telecom, Time Warner Communications, and TCTA might enter into a settlement agreement prior to the Hearing. Because settlement between these parties appeared eminent if additional time were provided, the Pre-Hearing Officer continued the Hearing until March 27, 2001 at 9:00 a.m.⁹²

On March 26, 2001, MLGW, Broadband, Networx, Time Warner Telecom, Time Warner Communications, and TCTA filed *Joint Stipulations of Fact*. As a part of that filing, MLGW, Broadband, Networx, Time Warner Telecom, Time Warner Communications, and TCTA agreed to the following:

In connection with the filing of these Joint Stipulations of Fact, the parties hereto have agreed that Memphis Networx, MLGW and Memphis Broadband will not rely upon any fact or facts that are contrary to the facts set forth herein but shall not be precluded from relying upon any other fact or facts; and that TCTA and Time Warner neither object to nor support the Application and Joint Petition and have agreed to the submission of the Application and Joint Petition for the Tennessee Regulatory Authority's consideration and determination on the record without their further participation in cross-examination of witnesses or submission of briefs, testimony or other pleadings.⁹³

⁹¹ *Order Reflecting Action Taken by the Pre-Hearing Officer at March 8, 2001 Pre-Hearing Conference and Rulings on Motions and Requests Relating to Discovery Matters* (Mar. 23, 2001).

⁹² Transcript of Proceedings, Mar. 23, 2001, p. 12 (Telephonic Pre-Hearing Conference).

⁹³ *Joint Stipulations of Fact*, pp. 1-2 (Mar. 26, 2001).

On March 27, 2001, the Authority reconvened the Hearing. During the course of the Hearing, a Director brought it to the parties' attention that the Director had received an ex parte document, and a dispute over the document ensued.⁹⁴ In the end, MLGW, Broadband, and Networx were given the opportunity to examine Larry Thompson with regard to the document after first obtaining leave from the Authority to discuss the documents with the witness outside the Hearing room.⁹⁵ After hearing from the final witness, Andrew P. Seamons, the Authority adjourned the Hearing on the evening of March 27, 2001.

IV. PETITION FOR APPROVAL OF OPERATING AGREEMENT

A. Standard of Review

On March 1, 2001, MLGW, Broadband, and Networx; Time Warner Telecom, Time Warner Communications, and TCTA; and the Consumer Advocate filed pre-hearing briefs addressing, in part, the issue of the criteria to be used by the Authority when approving an operating agreement under Tenn. Code Ann. § 7-52-103(d).⁹⁶ MLGW, Broadband, and Networx argued in their brief that the Authority should resolve three questions when evaluating the Amended and Restated Operating Agreement:

1. Did the municipal electric plant receive authorization from its board or supervisory body as required of T.C.A. § 7-52-103(d) for creation of the joint venture?
2. Was a "joint venture, or any other business relationship, with one (1) or more third parties" established as set forth in T.C.A. § 7-52-103(d)?
3. Were notice and an opportunity to be heard provided to interested parties as required in T.C.A. § 7-52-103(d)?⁹⁷

In their brief, Time Warner Telecom, Time Warner Communications, and TCTA argued that the General Assembly did not provide any "specific standards or criteria" and "intentionally

⁹⁴ Transcript of Proceedings, Mar. 27, 2001, p. 48 (Hearing).

⁹⁵ *Id.* at 65.

⁹⁶ *Order Granting Motion to Withdraw, Establishing Procedural Schedule, and Setting Hearing Dates*, Exhibit A (Feb. 9, 2001).

⁹⁷ *Pre-Hearing Brief of Memphis Networx, LLC, MLGW and Memphis Broadband, LLC*, p. 9 (Mar. 1, 2001).

made the Authority's approval powers broad to allow the Authority the power to review and determine if the agreement is in the public interest."⁹⁸ The Consumer Advocate argued that the Authority first should consider the statutory criteria for approval of a certificate for convenience and necessity.⁹⁹ Next, the Consumer Advocate argued that the Authority should determine whether the agreement is in the public interest.¹⁰⁰

After considering these arguments and reviewing the specific statutory provisions, the Authority finds that the criteria for approving an agreement entered into pursuant to Tenn. Code Ann. § 7-52-103(d) are broader than those proposed by MLGW, Broadband, and Networx, but are limited by the requirements of Tenn. Code Ann. § 7-52-103(d).¹⁰¹ Given this finding, the specific standards are as follows. First, as expressly stated in Tenn. Code Ann. § 7-52-103(d), the "board or supervisory body having responsibility for the municipal electric plant"¹⁰² must authorize the joint venture. Second, the provisioning of the service must be subject to Tenn. Code Ann. § 7-52-402 through 7-52-407. Thus, the Authority should look to these statutes to determine whether the operating agreement or similar documents permit activities that would violate these sections and provide for sufficient safeguards to prevent violations. Third, Tenn. Code Ann. § 7-52-103(d) requires that the Authority give interested parties notice and an opportunity to be heard on the petition for approval. Fourth, as provided for in Tenn. Code Ann. § 7-52-103(d), the entity created as a result of the joint venture is subject to "regulation by the [Authority] in the same manner and to the same extent as other certified providers of

⁹⁸ *Brief Filed on Behalf of Time Warner Telecom of the Mid-South, L.P. Time Warner Communications of the Mid-South, and the Tennessee Cable Telecommunications Association*, p. 7 (Mar. 1, 2001).

⁹⁹ *Hearing Brief of the Consumer Advocate and Protection Division as Requested by the TRA*, p. 5 (Mar. 1, 2001).

¹⁰⁰ *Id.*

¹⁰¹ Section 7-52-103(d) permits a municipality operating an electric plant "to establish a joint venture or any other business relationship . . . to provide related services, subject to the provisions of §§ 7-52-402 through 7-52-407." Tenn. Code Ann. § 7-52-103(d) (Supp. 2000).

¹⁰² *Id.*

telecommunications services, including, without limitation, rules or orders governing anti-competitive practices”¹⁰³ Thus, the Authority must determine whether the operating agreement complies with and the resulting entity will abide by the Authority’s rules, regulations, and orders. Fifth, Tenn. Code Ann. § 7-52-103(d) further requires that the entity created through the joint venture “shall be considered as and have the duties of a public utility, as defined in T.C.A. § 65-4-101, but only to the extent necessary to effect such regulation and only with the respect to the provision of related services.”¹⁰⁴ Thus, the Authority must ensure that the operating agreement creates an entity capable of fulfilling the statutory duties of a public utility.

B. Findings of Fact and Conclusions of Law

1. The Board of Commissioners of MLGW is the supervisory body charged with responsibility for the electric plant.¹⁰⁵ On March 4, 1999, the Board of Commissioners unanimously voted to “initiate and establish a telecommunications entity.”¹⁰⁶ On August 19, 1999, the Board of Commissioners of MLGW unanimously approved a resolution to establish a Telecommunications Division as a subdivision of the Electric Division. This resolution included specific authorization for the Telecommunications Division to “organize, create, manage, operate, either wholly or jointly, with others an entity to provide or perform those services authorized for the Telecommunication Division.”¹⁰⁷ Therefore, the Directors find that the appropriate supervisory body authorized the joint venture as required by Tenn. Code Ann. § 7-52-103(d).¹⁰⁸

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Joint Stipulations of Fact*, p. 2 (Mar. 26, 2001).

¹⁰⁶ Hearing Exhibit 1 (*Application and Joint Petition*, Exhibit D).

¹⁰⁷ *Id.*

¹⁰⁸ *Pre-Hearing Brief of Memphis Networx, LLC, MLGW and Memphis Broadband, LLC*, pp. 9-10 (Mar. 1, 2001).

2. The Authority issued numerous notices advising interested parties and the public of the proceedings in this docket. In particular, the Authority issued a *Notice of Pre-Hearing Conference* on February 8, 2000 in which the Authority scheduled a pre-hearing conference and requested petitions for intervention. Thereafter, eight (8) parties officially intervened and participated in the proceedings. One organization¹⁰⁹ and members of the public attended, but did not participate, in the hearing. The Authority held an extensive Hearing in this matter on July 17th through the 20th of 2000, September 11th through the 15th of 2000, October 16th through the 19th of 2000, and March 27, 2001, totaling fifteen (15) days. Therefore, the Authority finds that it provided the requisite notice and an opportunity to be heard as required by § 7-52-103(d).

3. Tenn. Code Ann. § 7-52-402 specifically prohibits the subsidization of telecommunication services by the electric operations.¹¹⁰ The relationship between Networx and the Telecommunications Division of MLGW creates the potential for inappropriate and anti-competitive cross-subsidization activities. To lessen this potential, Networx has agreed to take certain actions. First, Networx and MLGW will not have common employees.¹¹¹ Second, MLGW asserted that “[i]n accordance with the requirements of T.C.A. § 7-52-405, as applicable, MLGW will charge Networx the highest rate for pole attachments and underground installations as it charges any third party under comparable agreements.”¹¹² Third, MLGW will operate in

¹⁰⁹ The Coalition of Black Employees of MLG&W's Workers filed correspondence with the Authority and attended portions of the hearing.

¹¹⁰ This section provides: “A municipality providing any of the services authorized by § 7-52-401 shall not provide subsidies for such services.” Tenn. Code Ann. § 7-52-402 (1998).

¹¹¹ Transcript of Proceedings, July 17, 2000, v. I-A, pp. 79-80 (Hearing - Direct Examination of Ward Huddleston, Jr.); Transcript of Proceedings, July 18, 2000, v. II-C, p. 145 (Hearing - Direct Examination of John McCullough).

¹¹² John McCullough, Pre-Filed Supplemental Testimony, p. 6 (May 11, 2000). Section 7-52-405 provides: “For regulatory purposes, a municipality shall allocate to the costs of providing any of the services authorized by § 7-52-401: (1) An amount for attachments to poles owned by the municipality equal to the highest rate charged by the municipality to any other person or entity for comparable pole attachments.” Tenn. Code Ann. § 7-52-405 (1998).

accordance with the cost allocation manual submitted in this proceeding.¹¹³ Fourth, MLGW agreed that "any interdivision loan will be evidenced by a note containing an unconditional promise to pay, a rate of interest as required under Tenn. Code Ann. § 7-52-402, and repayment terms and conditions as may be required by the State Director of Local Finance pursuant to Tenn. Code Ann. § 7-52-402 and other applicable law."¹¹⁴ Fifth, MLGW agrees to abide by certain requests of the Consumer Advocate including: filing an annual report listing the level of tariffed and nontariffed services; maintaining records in a manner that will allow for audit and review by the authority; and following National Association of Regulatory Utility Commissioners' guidelines, Federal Communication Commission affiliate transaction rules, and federal structural separation provisions.¹¹⁵ Given these assertions, the Directors conclude that MLGW, Broadband, and Networx have demonstrated that they do not intend to engage in anti-competitive activities, such as cross-subsidization, and have implemented safeguards to prevent such activities.

4. Networx has agreed that it will comply with Authority policies, rules, and orders.¹¹⁶ The Authority further finds that Time Warner Telecom, Time Warner Communications, and TCTA failed to establish that MLGW, Broadband, and Networx have engaged in activities in violation of the Authority's rules.

¹¹³ Transcript of Proceedings, July 17, 2000, v. I-A, pp. 79-80 (Hearing - Direct Examination of Ward Huddleston, Jr.). At the start of his direct testimony, John McCullough added the cost allocation manual as Exhibit C to his testimony. Transcript of Proceedings, July 18, 2000, v. II-C, p. 142 (Hearing - Direct Examination of John McCullough); *Joint Stipulations of Fact*, p. 6 (Mar. 26, 2001).

¹¹⁴ *Joint Stipulations of Fact*, p. 5 (Mar. 26, 2001).

¹¹⁵ Transcript of Proceedings, July 18, 2000, v. II-C, pp. 148-49 (Hearing - Direct Examination Testimony of John McCullough); *Joint Stipulations of Fact*, p. 8 (Mar. 26, 2001). During the cross-examination of Archie Hickerson, the Consumer Advocate's witness, Mr. Hickerson agreed that these concessions conformed to his recommendations and stated that the "Consumer Advocate Division supports the granting of an application that would result in [the] introduction of additional competition in the Memphis area." Transcript of Proceedings, Sept. 12, 2000, v. VI-A, pp. 20-21 (Hearing - Cross-Examination of Archie Hickerson).

¹¹⁶ Transcript of Proceedings, July 17, 2000, v. I-A, pp. 73 & 84 (Hearing - Direct Examination of Ward Huddleston, Jr.); Ward Huddleston, Jr., Pre-Filed Direct Testimony, p. 6 (Feb. 4, 2000).

5. Having found that Networkx possess the requisite technical and managerial capabilities, the Authority finds that Networkx is capable of fulfilling its duties as a public utility as required by Tenn. Code Ann. §7-52-103(d).¹¹⁷

C. Conclusion

Based on these findings and conclusions, the Directors voted unanimously to grant the Joint Petition, as amended on December 21, 2000, thereby, approving the Restated and Amended Operating Agreement between MLGW and Broadband, which creates Networkx.

V. APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

A. Standard of Review

Tenn. Code Ann. § 65-4-201(c) contains certain standards that a competing telecommunications service provider must meet to receive a certificate of public convenience and necessity. Under this section, the competing provider must provide notice to the incumbent local exchange telephone companies and other interested parties. Moreover, the applicant must demonstrate that it will adhere to all applicable Authority policies, rules and orders and that it possesses "sufficient managerial, financial and technical abilities to provide the applied for services."¹¹⁸ Also, a municipality offering telecommunications services must comply with Tenn. Code Ann. §§ 7-52-401 through 7-52-407 in order to obtain a certificate.¹¹⁹ Tenn. Code Ann. § 65-5-212 requires competing telecommunications service providers to file a small and minority-owned telecommunications business participation plan with their application for a certificate.¹²⁰ The small and minority-owned telecommunications business participation plan "shall contain

¹¹⁷ For a further explanation of the managerial and technical capabilities of Networkx, see section VB of this Order.

¹¹⁸ Tenn. Code Ann. § 65-4-201(c) (Supp. 2000).

¹¹⁹ *Id.* §§ 7-52-401 to 407 (1998); see also *In re: Application of Electric Power Board of Chattanooga For a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Service*, Docket No. 97-07488, *Order Approving Application for Certificate of Public Convenience and Necessity*, pp. 2-4 (May 10, 1999).

¹²⁰ Tenn. Code Ann. § 65-5-212 (Supp. 2000).

such entity's plan for purchasing goods and services from small and minority telecommunications businesses and information on programs, if any, to provide technical assistance to such businesses."¹²¹ Lastly, absent specific exceptions, which do not apply to this case, telecommunications service providers must file "a corporate surety bond or irrevocable letter of credit in the amount of twenty thousand dollars (\$20,000.00) to secure the payment of any monetary sanction imposed in any enforcement proceeding" brought under Title 65 or the Consumer Telemarketing Protection Act of 1990.¹²²

B. Findings of Fact and Conclusions of Law

1. Network is a limited liability company organized under the laws of the State of Tennessee, and the Tennessee Secretary of States Office granted Networx authority to do business in the State of Tennessee on November 8, 1999.¹²³ Networx principal place of business is located at 7555 Appling Center Drive, Memphis, TN 38133-5069.¹²⁴

2. Networx intends to provide wholesale local exchange telecommunications services to carriers; retail local exchange telecommunications services to end users; and local services over its own facilities as well as facilities of other carriers. Additionally, Networx seeks authority to resell intraLATA local exchange and interLATA exchange services in Tennessee. The proposed services of Networx include, but are not limited to: Digital Signaling Zero (DSO) Voice and Digital Grade; Dedicated DS1 and DS3; Optical Carrier (OC) 3 and OC12; ATM; Frame Relay Service; Switched Transport; Switched Feature Group D; Toll Free Dialing; Centrex; Custom Calling Features; Asymmetric Digital Subscriber Line (ADSL); 911 and E911 emergency service; white page directory listings and directory assistance; consumer access to

¹²¹ *Id.*

¹²² *Id.* § 65-4-125(j) (Supp. 2000).

¹²³ Hearing Exhibit 1 (*Application and Joint Petition*, Exhibit B).

¹²⁴ *Id.* (*Application and Joint Petition*, p. 2).

and support for the Tennessee Relay Center; free blocking for 900, 976 type services in accordance with Authority policy; Lifeline and link-up to qualifying citizens; educational discounts consistent with Authority policy. Networkx will begin providing service in Shelby County, Tennessee in BellSouth's exchanges with eventual expansion throughout Tennessee.¹²⁵

3. Networkx provided notice of its application to eighteen (18) incumbent local exchange carriers and interested parties on November 24, 1999.¹²⁶

4. Networkx has not applied to any other state for authority to provide telecommunications services.¹²⁷

5. With respect to Networkx's managerial and technical ability, Networkx submitted the resumes of Ward Huddleston, Chief Manager; David Ori, Secretary and Chief Financial Officer; and James R. McDaniel, Manager of Engineering.¹²⁸ This evidence demonstrates extensive experience in the management of telecommunications services and business operations. In addition, Networkx explained that it would utilize the consulting and technical services of ADL, Horrell Communications, Contactica, Inc., and Nortel Networks.¹²⁹ The Authority concludes that Networkx possesses the requisite expertise to provide the applied for services based upon the foregoing demonstration of managerial fitness and technical ability.

¹²⁵ *Id.* (Application and Joint Petition, p. 5-6).

¹²⁶ *Id.* (Application and Joint Petition, Notice of Filing of Application and Joint Petition attached).

¹²⁷ Ward Huddleston, Jr., Pre-Filed Direct Testimony, p. 3 (Feb. 4, 2000).

¹²⁸ Hearing Exhibit 1 (Application and Joint Petition, Exhibit F – Resumes of Ward Huddleston, Jr. and David B. Ori & Exhibit G – Resume of James R. McDaniel). In the pre-filed testimony submitted with the *Amendment to the Application of Memphis Networkx, LLC and the Joint Petition of MLGW and A&L*, Ward Huddleston answered “no” to the question “have the managerial or technical qualifications of applicant changed.” Ward Huddleston, Jr., Pre-Filed Supplemental Testimony, p. 1 (Dec. 21, 2000).

¹²⁹ Hearing Exhibit 1 (Application and Joint Petition, pp. 7-8); Ward Huddleston, Jr., Pre-Filed Direct Testimony, p. 4 (Feb. 4, 2000). In the pre-filed testimony submitted with the *Amendment to the Application of Memphis Networkx, LLC and the Joint Petition of MLGW and A&L*, Ward Huddleston stated that Memphis Networkx would utilize consultants “on an as-needed basis.” Ward Huddleston, Jr., Pre-Filed Supplemental Testimony, p. 1 (Dec. 21, 2000).

6. On August 19, 1999, the Board of Commissioners of MLGW approved a twenty million dollar (\$20,000,000.00) loan from the Electric Division of MLGW to the Telecommunications Division for investment in Networkx.¹³⁰ The City Council of Memphis approved MLGW's 2000 budget, which included a line item for the twenty million dollar (20,000,000.00) loan, on December 7, 1999.¹³¹ A vice-president for MLGW testified that MLGW and Broadband have each agreed to contribute ten million dollars (\$10,000,000.00) in equity and have each committed an additional six hundred thousand dollars (\$600,000.00) for expenses pending regulatory authority.¹³² Having reviewed the capital contribution requirements of MLGW and Broadband along with the financial statements of MLGW, Broadband, and Networkx,¹³³ the Authority concludes that Networkx possesses the financial ability to offer the above listed services.

7. Networkx agrees that it will comply with Authority policies, rules, and orders.¹³⁴

8. As stated previously, Networkx has agreed to implement safeguards to ensure compliance with Tenn. Code Ann. §§ 7-52-401 through 7-52-407.¹³⁵

9. Networkx has filed with the Authority a detailed small and minority-owned telecommunications business participation plan that meets the requirements of Tenn. Code Ann. § 65-5-212.¹³⁶

¹³⁰ Hearing Exhibit 1 (*Application and Joint Petition*, Exhibit D).

¹³¹ Hearing Exhibit 17 (excerpt of City of Memphis City Council public hearing).

¹³² Larry Thompson, Pre-Filed Supplemental Testimony, p. 3 (Dec. 21, 2000).

¹³³ Ward Huddleston, Jr., Pre-Filed Supplemental Testimony, Exhibit 34 (Mar. 11, 2000) (Memphis Networkx, LLC Balance Sheet and Memphis Networkx LLC Statement of Operations) (filed under seal). *Amendment to the Application of Memphis Networkx, LLC and Joint Petition of MLGW and A&L*, Exhibit W (Dec. 21, 2000) (portions of document including exhibit W filed under seal). This document was made a part of the evidentiary record, but due to a misunderstanding was not given a number. Transcript of Proceedings, Mar. 27, 2001, v. I-A, pp. 9-10 (Hearing - Direct Testimony of Andrew P. Seamons).

¹³⁴ Transcript of Proceedings, July 17, 2000, v. I-A, pp. 73 & 84 (Hearing - Direct Examination of Ward Huddleston, Jr.); Ward Huddleston, Jr., Pre-Filed Direct Testimony, p. 6 (Feb. 4, 2000).

¹³⁵ For further explanation of the specific safeguards, see section IVB of this Order.

¹³⁶ Hearing Exhibit 1 (*Application and Joint Petition*, Exhibit L).

10. Section 2.5(c) of the Amended and Restated Operating Agreement provides:

In furtherance of its business, and not by way of limitation, the Company intends (i) within two years from the Approval Date, to install telecommunication fibers at certain locations in and near St. Jude Hospital and the housing developments known as Jefferson Square, R.Q. Venson and Barry Holmes, and (ii) in Fiscal Years the Company has Net Operating Profits, to commit 1% of its Net Operating Profits (not to exceed \$1 million per Fiscal Year) to the development and enhancement of telecommunications services in the low-income areas of Shelby County, Tennessee.¹³⁷

In addition, Networkx made a commitment to the Authority that it would provide telecommunications services to underserved areas within three (3) years of approval of the Application if competition does not develop in those areas.¹³⁸

11. Networkx has complied with Tenn. Code Ann. § 65-4-125(j) by filing with the Authority a letter of credit.¹³⁹

12. Upon review of the Application and the record in this matter, the Directors find that approval of Networkx's Application will inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services market in the State and by fostering the development of an efficient, technologically advanced statewide system of telecommunications services.

C. Conclusion

Based on the above findings and conclusions, the Directors unanimously voted to grant Networkx a certificate of public convenience and necessity for the State of Tennessee. The

¹³⁷ *Amendment to the Application of Memphis Networkx, LLC and Joint Petition of MLGW and A&L*, Exhibit U (Dec. 21, 2000). This document was made a part of the evidentiary record, but due to a misunderstanding was not given a number. Transcript of Proceedings, Mar. 27, 2001, v. I-A, pp. 9-10 (Hearing - Direct Testimony of Andrew P. Seamons).

¹³⁸ Ward Huddleston, Pre-Filed Supplemental Testimony, p. 2 (Dec. 21, 2001); Larry Thompson, Pre-Filed Supplemental Testimony, p. 5 (Dec. 21, 2001); Andrew P. Seamons, Pre-Filed Supplemental Testimony, p. 4 (Dec. 21, 2001). Ward Huddleston, Jr. defined "underserved areas" as "principally minority populations and relatively poor that are not currently offered high speed capacity services by the incumbents." Transcript of Proceedings, July 17, 2000, v. I-C, p. 26 (Hearing - Cross-Examination of Ward Huddleston, Jr.).

¹³⁹ Networkx filed a letter of credit with the Authority on July 5, 2001.

Directors further voted unanimously to require MLGW and Networx to submit to annual audits that will include an examination to assure that MLGW and Networx are in compliance with Tennessee statutes and the Authority's rules and orders.

IT IS THEREFORE ORDERED:

1. The Joint Petition of Memphis Light, Gas & Water Division, a Division of the City of Memphis, Tennessee and Memphis Broadband, LLC, as amended on December 21, 2000, for approval of the Amended and Restated Operating Agreement for the creation and operation of Memphis Networx, LLC is granted.

2. The Application of Memphis Networx, LLC, as amended on December 21, 2000, for a Certificate of Public Convenience and Necessity is granted.¹⁴⁰

3. Memphis Light, Gas & Water Division and Memphis Networx, LLC shall submit to an audit that will include an examination to determine whether Memphis Light, Gas & Water Division, a Division of the City of Memphis, Tennessee and Memphis Networx, LLC are in compliance with Tennessee law and the Authority's rules and orders. The audit shall be conducted by an independent auditor to be chosen by Memphis Networx, LLC, but the auditor shall work under the direction and supervision of the Authority. The audits shall commence one year from the date of this order and shall continue on an annual basis unless otherwise ordered by the Authority.

4. In order to prevent and deter cross-subsidization in the future, Memphis Light, Gas & Water Division and Memphis Networx, LLC shall abide by the following requirements:

- (a) Memphis Networx, LLC and Memphis Light, Gas & Water Division shall not have common employees.

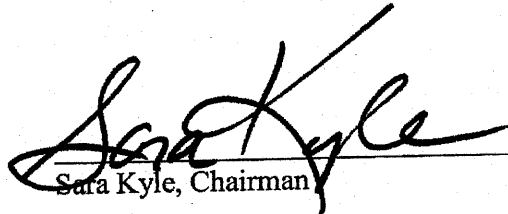
¹⁴⁰ On January 29, 2001, Networx filed the *Petition of Memphis Networx, LLC for Approval of Franchise*. This filing was assigned Docket No. 01-00091. On March 8, 2001, the Directors appointed General Counsel or his designee to act as the Pre-Hearing Officer to prepare the docket for hearing. Under the guidance of the Pre-Hearing Officer, this docket is proceeding through the pre-hearing process.

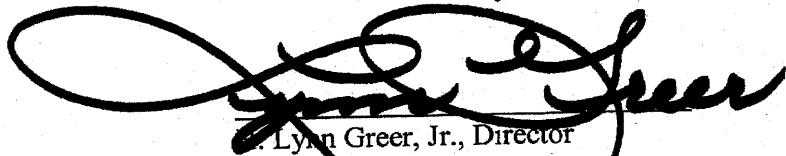
- (b) Memphis Light, Gas & Water Division shall charge Memphis Network, LLC the highest rate for pole attachments and underground installations as it charges any third party under comparable agreements as required by Tenn. Code Ann. § 7-52-405.
- (c) Memphis Light, Gas & Water Division and Memphis Network, LLC shall file an annual report which shall set forth:
 - (1) the functions performed by Memphis Light, Gas & Water Division's Telecommunications Division;
 - (2) the amount and types of costs allocated to the Telecommunications Division from Memphis Light, Gas & Water Division;
 - (3) a description of the methods and procedures used to identify and allocate such costs;
 - (4) the tariffed services provided by each of Memphis Light, Gas & Water Division's other divisions to Memphis Network, LLC;
 - (5) the dollar amount of such transactions in item (4) above;
 - (6) the non-tariffed services provided to Memphis Network, LLC by Memphis Light, Gas & Water Division;
 - (7) the dollar amount of such transactions in item (6) above;
 - (8) the method used to determine the price of such services (i.e. cost, prevailing market price, etc.);
 - (9) the services provided to Memphis Light, Gas & Water Division by Memphis Network, LLC;
 - (10) the dollar amount of each such service provided to Memphis Light, Gas & Water Division by Memphis Network, LLC; and
 - (11) the method used to determine the price of such services (i.e. cost, prevailing market price, etc.).
- (d) Memphis Light, Gas & Water Division and Memphis Network, LLC shall maintain records in a manner that shall allow for audit and review by the Authority and shall comply with:
 - (1) National Association of Regulatory Utility Commissioner's "Cost Allocation and Affiliate Transactions Guidelines for the Energy Industry";
 - (2) Federal Communication Commission affiliate transaction rules, 47 C.F.R. § 32.27; and
 - (3) Federal Communication Commission cost allocation rules, 47 C.F.R. § 64.901 - .904.

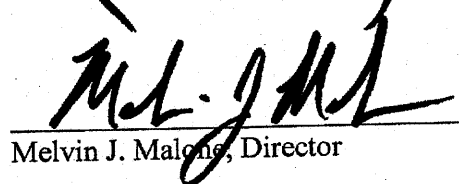
5. On behalf of its Telecommunications Division, Memphis Light, Gas & Water Division will not contract or enter into any agreement with another entity that provides for the joint ownership or joint control of assets, the sharing of profits and losses, or the sharing of revenues until the Tennessee Regulatory Authority approves such contract or agreement on petition and after notice and opportunity to be heard has been extended to interested parties. This provision shall not apply to any service or transaction which is not subject to regulation by the Tennessee Regulatory Authority.

6. Any party aggrieved by this Order may file a Petition for Reconsideration with the Tennessee Regulatory Authority pursuant to Tenn. Code Ann. § 4-5-317 within fifteen (15) days of the entry of this Order.

7. Any party aggrieved by the decision of the Tennessee Regulatory Authority may file a Petition for Review with the Tennessee Court of Appeals, Middle Division, within sixty (60) days of the date of entry of this Order.


Sara Kyle, Chairman


Lynn Greer, Jr., Director


Melvin J. Malone, Director

ATTEST:


K. David Waddell, Executive Secretary